

North General Hospital and Doctors Council. Case 2-RC-21323

June 6, 1994

DECISION AND DIRECTION OF ELECTION

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

Upon a petition for election filed under Section 9(c) of the National Labor Relations Act, a hearing was held on various dates in July and August 1993 before a duly designated hearing officer of the National Labor Relations Board. On October 6, 1993, pursuant to Section 102.67(h) of the Board's Rules and Regulations, the case was transferred to the Board for decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully reviewed the entire record in this proceeding, including the posthearing briefs filed by the parties, the Board makes the following findings:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. North General Hospital (the Hospital) is located in New York, New York. The Petitioner, Doctors Council, seeks to represent a unit of all physicians and dentists employed by the Hospital except directors of departments. At the hearing, the parties agreed that there are three issues in dispute: (1) whether the attending physicians in the departments of medicine and surgery should be excluded from the petitioned-for unit as statutory supervisors because they supervise residents; (2) whether the three physicians in the department of radiology should be excluded from the unit on the ground that that department is scheduled to close; and (3) whether the following 10 physicians are statutory supervisors and should therefore be excluded from the unit: Drs. Winvull Robinson, Robert Herman, Mark Alerte, Tapan Sakar, Onwar Aziz, Bernard Langwehr, Robert Rosenthal, Kutub Nadaf, Magoi Bebawi, and Moshen Samii.

Attending Physicians in Departments of Medicine and Surgery

The Hospital contends that the attending physicians in the departments of medicine and surgery are statutory supervisors based on their supervision of the interns and residents in those departments. Although the

Hospital recognizes that the Board has determined that interns and residents are not employees under the Act,¹ the Hospital contends that the physicians should nevertheless be excluded as statutory supervisors because they control the work and evaluate the performance of these individuals. The Hospital also points out that residents, although not employees for collective-bargaining purposes, possess a number of employee characteristics.² The Petitioner maintains that because the interns and residents are not employees under the Act, the attending physicians cannot be statutory supervisors.

We agree with the Petitioner. Although interns and residents possess some characteristics of employee status in that they usually receive a stipend and some fringe benefits, the Board, based on well-established precedent, has found them to be primarily students, not employees, because they participate in a residency program primarily "to pursue the graduate medical education that is a requirement for the practice of medicine."³ Applying this precedent here, we find that the interns and residents at the Hospital are primarily students and therefore are not employees under the Act. Because the attending physicians do not exercise supervisory authority over any employees of the Hospital, they cannot be supervisors within the meaning of the Act.⁴ Accordingly, we find that the attending physicians in the departments of medicine and surgery are not statutory supervisors and shall include them in the bargaining unit.

Radiology Department

The Hospital seeks to exclude all physicians in the department of radiology on the ground that the radiology department is scheduled to close in the very near future. In this regard, Baptiste, the associate administrator for clinical services, testified that the Hospital had been planning for over a year to disband the radiology department and to subcontract out the radiology work, that at the time of the hearing the Hospital was negotiating with Lennox Hill Radiology Group to take

¹ See, e.g., *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), and *Kansas City General Hospital*, 225 NLRB 108 (1976).

² In this regard, Alan Liebowitz, the director of human resources, testified that there were 33 residents in the department of medicine and 12 residents in the department of surgery, that all residents provide some degree of patient care, and that if there were no interns and residents, the Hospital would have to hire approximately 35-40 additional attending physicians to perform their work. Liebowitz also testified that there was a collective-bargaining agreement in effect between the Hospital and the Committee of Interns and Residents that provided terms and conditions of employment for the housestaff. Moreover, the Hospital treats the residents the same as other employees in that it provides them with worker's compensation, W-2 forms, and unemployment insurance.

³ *Cedars-Sinai Medical Center*, 223 NLRB at 253.

⁴ See, e.g., *Fleet Transport Co.*, 196 NLRB 436, 438 fn. 6 (1972), *Fordham University*, 193 NLRB 134, 136 (1971), and *Eureka Newspapers*, 154 NLRB 1181, 1185 (1965).

over that work, and that the target date for a contract was October 1, 1993. Baptiste also testified that the Hospital had informally told the three doctors in its radiology department, Drs. Tong, Lee, and Samii, that they would be laid off when the contract went into effect, but that it had not yet given them anything in writing.

The Board has frequently held that:

the eligibility of voters in Board elections is to be determined on the basis of employment status of each voter during the eligibility period and at the time of the election. *Accordingly, any change in employment status subsequent to the election is immaterial with regard to eligibility in an election.*⁵

Thus, in determining whether the physicians in the radiology department are eligible to vote, the fact that they may be permanently laid off soon after the election is irrelevant to the issue of whether they are eligible to vote in that election. Accordingly, we find that the physicians in the radiology department are eligible to vote in the election if they otherwise satisfy the Board's eligibility requirements and shall therefore include them in the petitioned-for unit.⁶

Individual Physicians

The Hospital would exclude the following 10 physicians as statutory supervisors. The Petitioner contends that they are not supervisors and therefore should be included in the bargaining unit. Applying Section 2(11) of the Act,⁷ we find as follows:

1. Dr. Winvull Robinson

Dr. Robinson is the director of the psychiatric in-patient service in the department of psychiatry. The acting director of the department of psychiatry is Dr. Gershberg. There are two staff psychiatrists in the in-patient service, Drs. Paz and Riguer. Dr. Paz works full time and Dr. Riguer works half-time. Also in the

in-patient service are a psychologist, an art recreation therapist, and an occupational therapist.

Dr. Gershberg testified that he "assumed" that Dr. Robinson had a role in hiring Dr. Paz and that it was Dr. Robinson's responsibility to monitor the performance of the professionals in the in-patient service and to take care of any problems that arose. Dr. Robinson testified that he neither interviewed nor recommended the hire of either Dr. Paz or Dr. Riguer, and that he does not hire, fire, or discipline the employees in this department. Dr. Robinson also testified that while he coordinates some functions concerning clinical duties for quality assurance monitoring and holds general staff meetings weekly, there are no other differences between his duties and those of Drs. Paz and Riguer.

It is well established that "[t]he Board will not exclude an individual from voting for a collective-bargaining representative unless the record evidence establishes that the individual is, in fact, ineligible to vote." *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989). Based on this record, we find no evidence that Dr. Robinson possesses any authority described in Section 2(11) of the Act. The mere fact that Dr. Robinson "monitors" certain procedures and "takes care of any problems" does not establish that his interaction with the other professionals in the department rises to the level of responsible direction. Accordingly, we find that Dr. Robinson is not a statutory supervisor and therefore include him in the petitioned-for unit.

2. Dr. Robert Herman

Dr. Herman is the director of the Hospital's Alcoholism and Substance Abuse Treatment Program. The program includes the Alcoholism and Substance Abuse Treatment Center (ATC), a free-standing out-patient clinic 1 block from the Hospital, and the in-patient detoxification ward. The ATC and the detoxification unit are included in the department of psychiatry. As noted above, Dr. Gershberg is the acting director of that department.

Dr. Herman testified that both he and Paul Zukrensky, the acting director of the ATC, are involved in the supervision of the clinical staff in both the ATC and the detoxification ward. Zukrensky reports to Karen Cobham, the administrative coordinator in the department of psychiatry. Although their duties overlap somewhat, in general, Dr. Herman defers to Zukrensky on administrative issues and Zukrensky defers to Dr. Herman on clinical issues. Thus, Dr. Herman's responsibility for the clinical staff involves such matters as developing treatment plans for patients and reviewing patients' clinical progress. Dr. Herman plays no role in hiring, firing, or disciplining employees or in their evaluation.

⁵*Farmers Rendering Co.*, 115 NLRB 1014, 1016 (1956) (footnote omitted; emphasis added). See generally, *Apex Paper Box Co.*, 302 NLRB 67 (1991); *Amoco Oil Corp.*, 289 NLRB 280 (1988); and *Mercy College*, 231 NLRB 315 (1977).

⁶We note that if the doctors in the radiology department are permanently laid off prior to the election, they would no longer be in the bargaining unit and thus would not be eligible to vote in the election. It is axiomatic that in order to vote in an election an individual must be employed on election day. See, e.g., *Roy Lotspeich Publishing Co.*, 204 NLRB 517, 518 (1973).

⁷Sec. 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Dr. Gershberg testified that his knowledge of Dr. Herman's duties "relates to the job descriptions and the organization." According to Dr. Gershberg, Dr. Herman coordinates and directs all operations and "supervises" the acting director of the ATC who in turn "supervises" the clinical coordinator of the ATC and the counselors in that unit. Dr. Herman also "supervises" the coordinator of the detoxification unit who is the immediate supervisor of the four counselors in that unit. There is, however, a "dual reporting function" in the detoxification unit and the coordinator reports both to Dr. Herman and Cobham.

The mere fact that an employer states that an employee "supervises" other employees or holds that employee out to other employees as a "supervisor" is not enough to establish that that individual is a supervisor within the meaning of Section 2(11) of the Act. See, e.g., *Polynesian Hospitality Tours*, 297 NLRB 228 (1989), enf'd. 920 F.2d 71 (D.C. Cir. 1990).

Dr. Herman's alleged supervision of the clinical staff in the ATC and the detoxification ward primarily concerns the care and treatment of patients. To the extent that he responsibly directs the work of others, resolution of his status involves the consideration of the Supreme Court's recent decision in *NLRB v. Health Care & Retirement Corp.*, No. 92-1964, 1994 WL 197042 (May 23, 1994). Because this issue involves the status of only one individual, we have decided to defer the resolution of Dr. Herman's status. Accordingly, we direct that Dr. Herman vote subject to challenge.

3. Dr. Mark Alerte

Dr. Alerte is the medical director of the Hospital's Paul Robeson Clinic within the department of medicine. Dr. Huff, the acting director of the department of medicine, testified that while Dr. Alerte prepares quality assurance reports and submits them to Dr. Huff, Dr. Alerte otherwise independently runs the Robeson Clinic. Thus, according to Dr. Huff, Dr. Alerte supervises two other physicians who work on a regular basis at the clinic, Drs. Johnson and Carabuena, as well as other physicians who work on a "processional" basis (i.e., interns and residents). Also, Dr. Alerte personally recruited Dr. Limburg and recommended that he be hired. Specifically, Dr. Alerte "advised" Dr. Huff of his decision to hire Dr. Limburg, and based on that decision Dr. Limburg was hired. Dr. Alerte also interviewed Drs. Johnson and Carabuena and recommended that they be hired; Dr. Huff made the final decision to hire them. Dr. Alerte also has the authority to discipline the physicians at the Robeson Clinic. In fact, Dr. Limburg was disciplined and dismissed based on Dr. Alerte's evaluation of his performance as unsatisfactory.

Based on the above evidence, we find that the record establishes that Dr. Alerte has the authority to effectively recommend the hire,⁸ discipline, and discharge of doctors at the Robeson Clinic. Based on this Section 2(11) authority, we find that Dr. Alerte is a statutory supervisor and shall exclude him from the unit.

4. Dr. Tapan Sarkar

Dr. Sarkar is the associate director of the department of medicine and the director of the intensive care unit. He is also the attending physician in charge of pulmonary diseases. Dr. Sarkar testified that he neither interviewed nor was involved in the hiring of the six or seven doctors hired in the department of medicine within the last year. Dr. Huff, however, testified that Dr. Sarkar participated in the evaluations of Drs. Gertman and Issah, who were under consideration for hire as infectious disease attending physicians, and that Dr. Sarkar shared his opinions with her, as then deputy director, and with Dr. Reichman, the former director of medicine.

Together with Dr. Reichman, Dr. Sarkar also interviewed Shadad Parmar, a pulmonary function technician, 12 years ago. Dr. Reichman subsequently hired Parmar. At present, Dr. Sarkar oversees the clinical aspects of Parmar's work. Otherwise, Parmar reports to Mrs. Richardson, the administrator in the department of medicine.

Finally, Dr. Huff testified that Dr. Sarkar was in charge of the department of medicine when she was absent from the Hospital.

Even assuming that Dr. Sarkar participated in the evaluations of candidates for attending physician, there is no evidence that he effectively recommended the hire of those candidates. Mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish Section 2(11) supervisory authority. See *Jerry's United Super*, 289 NLRB 125, 141 (1988). Likewise, Dr. Sarkar's participation in Parmar's interview is insufficient to establish supervisory authority under the Act because there is no evidence that Dr. Sarkar effectively recommended that Parmar be hired. Further, while Dr. Sarkar may be "in charge" of the department in Dr. Huff's absence, the Hospital failed to present any evidence that Dr. Sarkar's duties in this regard encompass the exercise of Section 2(11) authority or that Dr. Sarkar's substitution for Dr. Huff is regular and substantial. *Hexacomb Corp.*, 313 NLRB No. 148, slip op. at 2 (Mar. 3, 1994). In these circumstances, we find that

⁸In finding that Dr. Alerte effectively recommended the hire of other physicians, we do not rely on Dr. Alerte's recommendations regarding the hire of Drs. Johnson and Carabuena because there is no evidence that Dr. Huff relied on Dr. Alerte's recommendations. See *A. Barton Hepburn Hospital*, 238 NLRB 95, 96 (1978).

Dr. Sarkar has not been shown to be a statutory supervisor and shall include him in the bargaining unit.

5. Dr. Onwar Aziz

Dr. Aziz is the attending physician in the employee health service. Dr. Aziz works at the Hospital approximately 12-1/2 hours per week and oversees medical care and diagnoses on physical exams. In this capacity Dr. Aziz “supervises” Gabby Salib, a physician’s assistant in the employee health service.⁹ According to Dr. Huff, Salib reports to Dr. Aziz “professionally,” and his vacation time has to be “coordinated” with Dr. Aziz.

We find that the Hospital has failed to present specific evidence that Dr. Aziz exercises supervisory authority within the meaning of Section 2(11). As noted above, the mere fact that an employer states that an employee “supervises” other employees is not enough to establish 2(11) supervisory status. Although Dr. Aziz interviewed Salib for employment, he was not the only interviewer, and the Employer has not shown that Dr. Aziz effectively recommended the hiring of Salib. Dr. Aziz shall therefore be included in the bargaining unit.¹⁰

6. Dr. Bernard Langwehr

Dr. Langwehr is both the acting chief of the emergency room, spending 8–16 hours per week in that capacity, and an attending physician in the department of surgery. Dr. Huff testified that although the emergency room is currently a shared service under the departments of medicine and surgery, the Hospital plans to make it into a separate, independent department in the very near future. To this end, the Hospital selected Dr. Bonnie Ross to become the director of the emergency department at the end of August 1993 and at that time Dr. Langwehr was to become a full-time attending physician with primary responsibility for patient care.

There is no evidence in the record that Dr. Langwehr exercises any supervisory authority within the meaning of Section 2(11) either in his capacity as acting chief of the emergency room or as a physician in the department of surgery. Accordingly, we find that he is not a statutory supervisor and shall include him in the bargaining unit.

⁹ As the physician’s assistant in the employee health service, Salib examines new employees, performs followup examinations, and carries out diagnostic studies.

¹⁰ The Petitioner asserts that, even assuming that Dr. Aziz exercises supervisory authority within the meaning of Sec. 2(11), he should still be included in the unit because Salib is a nonunit employee. See *Detroit College of Business*, 296 NLRB 318 (1989). In view of our finding that Dr. Aziz is not a statutory supervisor, we find it unnecessary to reach this issue.

7. Dr. Robert Rosenthal

Dr. Rosenthal is the director of the blood bank and the hematology lab. He reports to Dr. Bocar who has been the acting director of the department of laboratories since January 1992. Dr. Rosenthal also interacts with Fajardo, the acting supervisor of the blood bank, the blood bank technologists, and the night staff technologists, all of whom report to Wunder, the administrative coordinator of the lab.

Dr. Rosenthal testified that he oversees the technical aspects of the blood bank and lab and that his contact with the technologists is related to clinical issues involving patient care. Fajardo and Wunder schedule blood bank employees and arrange their vacations. Dr. Rosenthal plays no role in their evaluation or discipline. In fact, Dr. Rosenthal testified that the Hospital terminated Richard Meade, the night and weekend lab supervisor, although he had opposed that termination. Dr. Rosenthal also testified that, although he had written a memo in 1991 critical of Veronica Comrie, the administrative coordinator who preceded Wunder, he had never recommended her discharge and had played no part in her discharge a year later. However, Ernest Baptiste, the Hospital’s associate director for clinical services, testified that Dr. Rosenthal had recommended Comrie’s termination.

Although Dr. Bocar testified that Dr. Rosenthal directly supervises the lab technicians, participates in interviewing, and recommends, if necessary, the termination of technologists, she was not aware of any instances in which Dr. Rosenthal had, in fact, interviewed, suspended, or fired any employee. She also testified that the director of the department made all final decisions and that Dr. Rosenthal could only make recommendations regarding discipline.

Although the evidence regarding Dr. Rosenthal’s role in Comrie’s termination is in conflict, we observe that even had Dr. Rosenthal recommended Comrie’s discharge, there is no evidence in the record regarding what role, if any, that recommendation played in the Hospital’s decision to terminate her.¹¹ Accordingly, there is no record evidence that Dr. Rosenthal has effectively recommended the discharge of any employee or that he possesses any other supervisory authority as defined in Section 2(11). We find therefore that Dr. Rosenthal is not a statutory supervisor and shall include him in the bargaining unit.

8.–9. Dr. Kutub Nadaf and Dr. Magoi Bebawi

The Hospital provided no testimony regarding Drs. Nadaf’s and Bebawi’s supervisory status. Neither Dr. Nadaf nor Dr. Bebawi testified at the hearing. Because there is no record evidence in support of the Hospital’s contention that Drs. Nadaf and Bebawi are statutory

¹¹ *A. Barton Hepburn Hospital*, supra at 96.

supervisors, we find that these individuals are not statutory supervisors and shall include them in the bargaining unit.

10. Dr. Moshen Samii

As discussed above, Dr. Samii is one of two doctors in the radiology department along with Dr. Tong, the director of the department. Baptiste, the associate director of clinical services, testified that Dr. Samii works approximately 30 to 32 hours per week, spending 50 to 60 percent of the time in readings and procedures and the remainder teaching and working with the other doctors at the Hospital. When Dr. Tong is absent from the department, Dr. Samii is in charge, and in that capacity he is “involved with” scheduling and disciplinary matters. In particular, Baptiste testified that Dr. Samii can recommend disciplinary action, although he, Waite, the manager of the department, and Dr. Tong are also involved in decisions as to discipline and discharge. In addition, Dr. Samii was “involved and informed” in the decision to replace the hospital transcribers with an outside service, although Baptiste and the chief operating officer made the final decision to use the outside service.

Based on the above, we find that the Hospital has failed to present specific evidence that Dr. Samii exercises 2(11) supervisory authority. It is well established that “in connection with the authority to recommend actions, Section 2(11) requires that the recommenda-

tion must be effective.”¹² Here, although Samii can recommend discipline, there is no evidence in the record that his recommendations were the basis for any disciplinary actions or discharges. Moreover, although Dr. Samii may have been “involved” in the decision to replace the hospital transcribers with an outside service, the Hospital has failed to establish that Dr. Samii’s involvement included an effective recommendation in this regard or that his involvement touched on matters reached by Section 2(11). Accordingly, Dr. Samii shall be included in the bargaining unit.

Appropriate Unit

Accordingly, based on the foregoing, we find that the following employees constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time physicians and dentists employed by the Employer, including attending physicians in the Departments of Medicine and Surgery and physicians in the Department of Radiology; but excluding Directors of Departments, Dr. Mark Alerte, all other employees, guards and supervisors as defined in the Act.

[Direction of Election omitted from publication.]

¹² *Jerry’s United Super*, 289 NLRB 125, 141 (1988).